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OCTOBER TERM, 1983

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD F. WILSON and JEAN WILSON,
Petitioners,

vs.

JOHN R. BLOCK, Secretary of Agriculture;
R. MAX PETERSON, Chief Forester of the United States and
Acting Assistant Secretary of Agriculture for
National Resources and Environment,
Department of Agriculture; and
NORTHLAND RECREATIONS, INC., an Arizona corporation,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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ARGUMENT

A. The 16 U.S.C. §497 Land Use Permit Issue

The dual permit practice is nothing more than an ad hoc, departmental device by which hundreds of thousands of acres of public, national forest land is alienated to private entrepeneurs contrary to the plain will of Congress manifested in 16 U.S.C. §497's 80-acre recreation and resort limitation. The sheer amount of public, forest land thus transferred to private use, control and management throughout the United States is itself convincing proof of the substantial, national importance of this issue.

Equally compelling evidence of the far-reaching, national significance of the issue inheres in the ramifications of the Court of Appeals' decision upon the interrelationship of Congress and the Executive Departments in matters of public land dispositions. The 80-acre limit of 16 U.S.C. §497 is one of the clearest and broadest Congressional enactments of limitation extant, and, more importantly, is a conclusive exercise of Congress' plenary power over public land dispositions and regulation under Art. 4, §3, Cl. 2 of the Constitution. In permitting the Executive to circumvent the clear and unqualified acreage limit of 16 U.S.C. §497 (the 80-acre limitation), the Court of Appeals' decision allows an unwarranted intrusion by the Executive into a sphere of governmental power committed by the Constitution's Framers to Congress under circumstances in which the Congress has exercised that power to impose plain and clear acreage limitations upon all types of permits for all recreational uses and developments by private entrepeneurs on national forest lands. As such, Justice Blackmun's dissenting remarks made ten years ago, that "as the Court . . . so plainly reveals, the issues on the merits are substantial and deserve resolution", are equally true today. *Sierra Club v. Morton*, 405 U.S. 727, 757 (1972)[Blackmun, J., dissenting].

Respondents' plea to managerial discretion and plenary power over the forest reserves is both erroneous and misdirected in this case. The Agriculture Secretary's power over government property simply is not plenary but is limited by those granted by Congress and must be exercised within those limits and not otherwise. The Court's precedent indicates that the Secretary is bound by the 80-acre limitation of 16 U.S.C. §497 and cannot circumvent it through departmentally created devices like the dual-permit practice. Recognizing that "neither courts nor the executive agencies could proceed contrary to an Act of Congress in this congressional area of national power", the Court has held that in matters respecting the disposition of public lands it "cannot under the guise of interpretation create Presidential authority where there is none, nor rewrite congressional acts so as to make them mean something they obviously were not intended to mean". *United States v. California*, 332 U.S. 19, 27 (1947); *Confederated Band of Ute Indians v. United States*, 330 U.S. 169, 179 (1947).

Respondents' characterization of the Organic Act Special Use Permit as a revocable permit which must be renewed annually is both factually and legally erroneous. The Permit at issue provides under its "Miscellaneous Provisions" that it "shall expire and become void on 5-1-97", not annually as Respondents contend. The Permit cannot be revoked at any time in the discretion of the government because "discretion" under the permit at issue and the Forest Service Manual requires a showing that the land "is needed for a more important public purpose", or that the holder of the permit acted unsatisfactorily in breach of a condition of the permit, or that the "present use has become unsatisfactory". *Forest Service Manual* §2716.3(2)(b)(1)(2). Even upon breach of a condition, the permittee may cure such a breach after notice and avoid revocation. *Forest Service Manual* §2716.3. Elaborate administrative review procedures requiring that the government's action have a rational basis must be followed to effect revocation. 36 *C.F.R.*

§251.60 and 211.19. And, being inextricably tied by the nature of its land use (which cannot stand alone) money, improvements and the unitary recreational purpose of the entire ski area development underlying both permits, the Special Use Permit for ski runs creates a de-facto alienation of national forest lands in favor of private developers exceeding the 80-acre limit of 16 U.S.C. §497 which in fact gives the permittee the same security of tenure provided by that statute and the Term Permit issued under it.

Respondents are simply wrong when they persist in asserting that the 1915 Act provides authority for the issuance of term permits which is in addition to the authority contained in the 1897 Organic Act. The Court specifically rejected this argument in 1978 when it rejected the Government's contention that the 1960 Multiple Use Act, 5 U.S.C. §528, merely confirmed powers which had always existed and held that legislation subsequent to the Organic Act, like the 1960 Act or 16 U.S.C. §497, was "intended to *expand* the purpose for which the national forests should be administered" and thus was essential to create spheres of authority which did not exist and were in fact prohibited by the Organic Act. *United States v. New Mexico*, 438 U.S. 696, 707-708, 713, note 21 (1978), emphasis in the Court's Opinion.

Equally untenable is Respondents' contention that the sole purpose of the 1915 Act was to solve the problem of uncertain land tenure which impeded obtaining adequate financing for privately built improvements on Forest Service land. This departmental and committee interpretation was expressly rejected by the full Congress which itself imposed the original five (5) acre limit because without such a limit, "the Department of Agriculture might let them [the recreational developers] have a hundred or 50 or any amount" of land. 51 *Cong. Rec.* 9101 (1914)[coloquy between Senators Gallinger and Jones]. The acreage limitation of the 1915 Act was thus intended not only to prevent positively the very effects

achieved under the dual-permit practice but also was intended to insure that no more land than that specified in the Act's acreage limit would be stripped of trees and foliage so that "people can go and enjoy the scenery and the fishing and hunting" in "forests that are very beautiful in natural scenery" and "natural wonders". 52 *Cong. Rec.* 1787 (1915)[remarks of Congressman Hawley].

Respondents' assertion that the legislative history of the 1915 Act is devoid of an intent to limit the Secretary's authority to issue revocable permits under the Act of 1897 is thus both wholly wrong and a *non-sequitur*. The Special Use Permit for the Snow Bowl ski runs here simply is not in law or fact a revocable permit, and the Secretary's revocable permit authority, if any, is not truly at issue here. Moreover, no permit of any kind could issue for recreational purposes under the Organic Act of 1897 because, as the Court itself has squarely held, "[n]ational forests were not to be reserved for . . . recreational . . . purposes", and, *a fortiori*, could not be used or occupied for such purposes following their initial creation. *United States v. New Mexico, supra*, 438 U.S. at 707-708.

Respondents' attempt to avoid the logic and reasoning of the *New Mexico* holding is, we submit, unpersuasive. The *New Mexico* holding depended upon a definitive interpretation of the purpose and intent of the 1897 Organic Act, and the Secretarial power claimed here is plainly proscribed by that definitive construction of the 1897 Act. The Court of Appeals' failure even to acknowledge the *New Mexico* holdings' existence led the Court of Appeals to rest its analysis on a premise which squarely conflicts with the *New Mexico* holding which forecloses the argument that a recreational use permit power resided within the 1897 Organic Act which could be "supplemented" by later enactments like the 1915 Act.

Far from legitimizing the dual-permit device through the proverbial bootstrap, Respondents' litany of other uses of

forest lands for a variety of structures and facilities in fact severely erodes, if not vitiates, their argument. All of these uses listed by Respondents were expressly authorized by Congress through legislation enacted specifically to permit each use enumerated by Respondents.[1] The Court itself has specifically recognized that the rights granted under these statutes are described with particularity because the land uses which they permit could not otherwise exist and since a land use not expressly included in such legislation or implicitly essential to the use expressly authorized is forbidden in the national forests. *Utah Power & Light Company v. United States*, 243 U.S. 389, 408 (1917)[16 U.S.C. §522 and §524 (1905)]; *Chicago, M. & St. P. Ry. Co. v. United States*, 218 Fed. 288, 294 (9th Cir., 1915), *aff'd*, 244 U.S. 351, 356-58 (1914).

Under no circumstances does Respondents' contention, that Congress ratified the dual-permit practice when it amended 16 U.S.C. §497 in 1956, have any basis in law or fact. The radical change in the expansion of the 1915 Act's scope to

[1]Through the Act of March 4, 1911 Congress expressly permitted the use of forest lands for telephone and telegraph lines, power poles, power plants and power lines but strictly limited the area of land which could be so used, 36 Stat. 1253-54, 16 U.S.C. §523. Dams, reservoirs, water conduits and the like were expressly authorized through the Act of February 5, 1905, 33 Stat. 628, 16 U.S.C. §524. Schools and churches were expressly authorized by the Organic Act of June 4, 1897, 30 Stat. 36, 16 U.S.C. §479, but were strictly limited to two and one acres, respectively. Hotels and summer resorts were expressly authorized by the Act of March 4, 1915, 38 Stat. 1101, 16 U.S.C. §497, while sawmills, factories, farms, dairies and other commercial and industrial uses were expressly authorized under the Act of July 28, 1956, 70 Stat. 708, but were strictly limited to 80 acres. Such contempraneous legislation in fact supports Petitioners' view that positively expressed, Congressional authorization was necessary for private use of forest lands which altered the soil, foliage and natural conditions of the reserves. As the Ninth Circuit stated, "it must have been the view of Congress that without these enabling acts" there could be "no right" to use the forest reserves since "otherwise there was no need for their enactment". *Chicago, M. & St. P. Ry. Co. v. United States, supra*, 218 Fed. at 294.

include *"any other . . . facility necessary or desirable for recreation, public convenience or safety"*, 16 U.S.C. §497, emphasis added, precludes application of the doctrine of ratification by amendment and evidences a congressional intent to extend the scope of the recreational land uses subject to the 80-acre limit to the maximum extent possible. Significantly, Congress did not differentiate between the kinds of permits to which the 80-acre limit was applicable nor did it qualify the kinds of recreational uses to which it applied, but instead applied the 80-acre limit to all recreational uses and to all kinds of permits to private developers which involved land uses that were inherently long-term in nature. Contrary to Respondents' assertion, we submit that had Congress believed that the 80-acre limit could be nullified or circumvented, or had its sole concern been the security of a permittee's tenure, it would never have performed the purely futile act of retaining an acreage limitation but would have saved itself time and trouble by omitting any area limitation.

Indeed, as the Petition makes clear, there is no evidence that Congress knew of any administrative practice of permitting the location of major, indispensable facilities like ski runs and lifts on land covered by a supplementary permit, whatever it may have known about the practice of combining term and revocable permits. More importantly, Congress had no notice whatever that any practice of issuing dual permits would continue to occur after the 1956 amendment's enactment. Indeed, the legislative history of the 1956 amendment indicates that nearly three decades of Congressional resistance to an increase in the 1915 Act's acreage limit was overcome only because of the Agriculture Department's representations to Congress that such an increase was necessary precisely because winter sports facilities like ski runs and lifts were subject to the 1915 Act's acreage limit but could not legally exist without an increase in that Act's acreage limit.

Contrary to Respondents' claim, the 1960 Multiple Use-Sustained Yield Act, 16 U.S.C. §528, *et seq.*, neither implicitly

repealed 16 U.S.C. §497's 80-acre limit nor supplies an independent basis of authority under which the dual permit practice, as employed to circumvent the 80-acre limit, can be justified. While the Multiple Use Act created spheres of departmental authority which had never previously existed, *United States v. New Mexico, supra*, 438 U.S. at 713, note 21, the uses specified in that Act were deemed to be "secondary" only. Nothing in the Multiple Use Act or its legislative history indicates that the authority to effect such "secondary" uses as outdoor recreation could be delegated to private entrepeneurs in a manner which would circumvent or nullify the acreage limit of 16 U.S.C. §497 as amended in 1956.

Indeed, the circumstances following the 1956 amendment to 16 U.S.C. §497 and the Court's decision in *Sierra Club v. Morton, supra*, is far more consistent with congressional *disapproval* of departmental devices designed to circumvent the 80-acre limit. Of paramount significance here is the fact that when Congress elected to end the Mineral King controversy at issue in the *Sierra Club* case, it chose to employ the identical language used in the 1956 amendment to 16 U.S.C. §497 to forbid "the development of permanent *facilities* for downhill skiing within the area . . . ". 16 U.S.C. §45f(g), (1978).

At about the same time Congress failed to enact two bills, S. 1338, 95th Cong., 1st. Sess. (1977) and S. 2125, 94th Cong., 2d. Sess. (1975), which would have eliminated the 80-acre limit but which would have required the submission of proposed permits to Congress for at least tacit, though in some cases explicit, approval. These bills were specifically proposed because, as their sponsor, Senator Haskell of Colorado stressed in the floor debates, a strong fear existed among ski area operators and congressmen from states in which large ski areas existed that the dual-permit device was illegal and would be so declared by the courts. 123 *Cong. Rec.* S.6115, April 21, 1977 (daily ed.)[remarks of Senator Haskell]. These bills were passed by the Senate but failed to win House approval. 123 *Cong. Rec.* S. 11729, July 13, 1977 (daily ed.); 123 *Cong. Rec.* 22998 (1977).

These factors coupled with the plain clarity and unqualified scope of 16 U.S.C. §497's 80-acre limit as applied to private, recreational use of national forest land forbids the baptism of the dual-permit practice under the doctrine of congressional acquiescence. Where, as here, the statute is plain and clear and the administrative practice is contrary either to the statute's plain clarity or an obvious congressional intent, "it matters not what the practice of the department may have been *or how long continued*" since "an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate". Moreover, 16 U.S.C. §497 is a conclusive exercise of Congress' Property Clause power, and where the administrative practice involves "areas of doubtful constitutionality" only "explicit action by lawmakers", not inaction or acquiescence, can validate such a practice. *United States v. Graham*, 110 U.S. 219, 221 (1884); *Green v. McElroy*, 360 U.S. 474, 507 (1959); *Federal Maritime Commission v. Seatrain Lines*, 411 U.S. 726, 745-746 (1973).

Contrary to Respondents' jeremiad, we do not seek to annihilate all of the nation's ski areas. Our concern is the Snow Bowl and the important principles of the distribution of governmental power involved in the 80-acre issue. We acknowledge that it is easier to exalt expediency over principle where the expedient objects are facilities which provide middle-class pleasure rather than toxic waste dumps, but expediency should never preclude a principled resolution of an important issue like the instant one. Indeed, the Court has never permitted such purely remedial matters to preclude full inquiry into an important issue because its inherent, equitable powers permit it to fashion a decree which affords full relief to a prevailing petitioner but which applies prospectively only as to other similarly situated matters where substantial, inequitable results or the disruption of orderly government so merit. *Cipriano v. Houma*, 395 U.S. 701, 706 (1969); *Northern Pipeline Construction Company v. Marathon Pipe Line Company*, _____ U.S. _____, 98 S.Ct. 2858, 2880 (1982).

Through 16 U.S.C. §497 Congress has struck the balance which it deems appropriate with respect to the amount of national forest lands which a private, recreational developer may use and occupy, and this exercise of Congress' Property Clause power is conclusive upon both the executive and judicial branches of government. Inspite of the fact that the Courts must protect this congressional balance from Executive intrusion, the Courts below have failed to do so, choosing instead to allow the Executive to alienate hundreds of thousands of acres of national forest lands to private developers contrary to the will of Congress. In short, the dual-permit issue is substantial, and the merits of this rarely litigated issue, incorrectly adjudicated by the Courts below, should be reviewed and resolved by this Court.

B. The National Historic Preservation Act Issue.

Congress itself deemed the preservation and protection of even locally significant historical properties according to uniform, nationally applicable criteria to be of substantial, national importance when it created the National Historic Preservation Act and committed its administration to the Interior Department, not the Agriculture Department. 16 U.S.C. §470, §470-1, §470a. The century-old antagonism between the Interior Department and the Agriculture Department's Forest Service over public land jurisdiction simply cannot be allowed to frustrate this Congressional policy.

The best work of Congress in the significant area of protecting the historical and cultural heritage of America simply cannot mean one thing in the Ninth Circuit Court of Appeals and another thing in the District of Columbia Court of Appeals any more than it can achieve any variety of meanings in the District of Columbia itself depending upon which panel of circuit judges is drawn to hear a case arising under the Act. Yet this is precisely the result of the conflict between the Ninth

Circuit decisions, another District of Columbia Circuit decision and the present matter previously discussed in the Petition. This conflict results in substantial confusion respecting the meaning, administration and enforcement of public rights under the National Historic Preservation Act; and without definitive resolution by this Court, compliance with the Act becomes difficult, uncertain and subject to departmental caprice.

Respondents wrongly assert that the Act involves the exercise of discretionary action by the Agriculture Department. The clear terms of the Act and its legislative history demonstrate that eligibility determinations are to be made only by the Interior Department and must be *"based exclusively on the objective application of professionally established criteria of historical significance". H.R. Rep. No. 96-1457*, 96th Cong., 2d. Sess., p. 30 (1980)[emphasis added].

Application of such criteria has led the Interior Department to list mountain masses identical to the Peaks in size and historical significance. Under no circumstances can the Agriculture Department arrogate to itself the power to ignore this Interior Department precedent, especially through post-hoc rationalizations of counsel respecting the alleged "uniqueness" of the Peaks vis-a-vis the other listed mountains. *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, ___U.S.___, 103 S. Ct. 2856, 2866-2867 (1983); *FTC v. Texaco*, 417 U.S. 380, 397 (1974).

CONCLUSION

Based upon the foregoing and the reasons set forth in the Petition, we submit that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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